No. 80-1512

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In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. BRINTON, PETITIONER

v.

DEPARTMENT OF STATE AND ALEXANDER M. HAIG, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether confidential legal memoranda prepared by attorneys in the Office of the Legal Adviser of the Department of State in order to advise the Secretary of State concerning the legal status, under international law, of the West Bank, the Golan Heights, and the Gaza Strip, are protected from mandatory disclosure by Exemption 5 of the Freedom of Information Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 636 F. 2d 600. The opinion of the district court (Pet. App. 25a-38a) is reported at 476 F. Supp. 535.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1980 (Pet. App. 1a), and a petition for rehearing was denied on December 9, 1980 (Pet. App. 11a, 13a). The petition for a writ of certiorari was filed on March 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 4, 1977, petitioner filed a request, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, with the Department of State, seeking copies of the 1975 Memorandum of Understanding between the United

States and Israel and copies of legal opinions of the Department's Legal Adviser concerning the legal status, under international law, of the West Bank, the Golan Heights, and the Gaza Strip during the period since June 1967 (Pet. App. 2a, 25a-26a). The Department found nine documents that came within this request; it released one and withheld the remaining eight on the basis of Exemptions 1 and 5 of the FOIA, 5 U.S.C. 552(b)(1) and (5) (Pet. App. 2a-3a).[1]

In January 1978, petitioner filed this FOIA suit in the United States District Court for the District of Columbia to compel production of the withheld documents. The district court rejected the government's argument that petitioner had failed to exhaust administrative remedies, but it nonetheless referred the Exemption 1 claims to the State Department's Council on Classification Policy for review in light of a recently issued executive order on document classification (Pet. App. 3a). Following this review, the Department released the 1975 Memorandum of Understanding and portions of several of the other documents in issue; it reasserted an Exemption 5 claim as to all of the portions still withheld, including the names of the authors of the memoranda, and an Exemption 1 claim for some of the withheld information (*id.* at 3a-4a, 28a).

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[1] 5 U.S.C. 552(b)(1) and (5) exempt from FOIA disclosure records that are:

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

In June 1979, the district court entered summary judgment in favor of the government on the basis of its Exemption 5 claims. In particular, the court found that the memoranda, as confidential legal advice concerning Middle East diplomacy prepared by attorneys in the Legal Adviser's office, came within the attorney-client privilege (Pet. App. 31a-34a), a privilege incorporated in Exemption 5, and that there were no reasonably segregable non-exempt portions (*id.* at 35a-36a). The court also held that the memoranda constituted " 'predecisional' " and " 'deliberative' " documents insofar as they were "working papers of the Department of State in its ongoing negotiations in the Middle East," and it concluded that the names of the attorney authors of the memoranda are within Exemption 5 because their disclosure would "impair the deliberative process within the Department of State" (*id.* at 37a-38a). Because the Department's affidavits describing the documents were sufficiently detailed and there were no allegations of bad faith, the district court found it unnecessary to conduct an in camera review in determining the exempt status of the documents (*id.* at 29a-30a).

2. The court of appeals affirmed the district court's ultimate conclusion that the documents were protected from mandatory disclosure by Exemption 5 of the FOIA, but it did not rest its decision on the attorney-client privilege. Rather, the court of appeals noted that "[t]he documents at issue in this case are all in the nature of legal advice to the Secretary of State," and it held that "[t]here can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5" (Pet. App. 7a; footnote omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other

court of appeals. Review by this Court is accordingly unwarranted.

Petitioner essentially contends that the documents at issue in this case are not predecisional deliberative memoranda within the protection of Exemption 5 because the making of foreign policy cannot properly be equated with an "adjudicatory process" (Pet. 8) and because "no decision within an adjudicatory sense is to be made" (Pet. 9). Petitioner suggests that, for this reason, Exemption 5 does not encompass confidential advice to State Department officials responsible for making foreign policy decisions. This contention is contrary to this Court's descriptions of Exemption 5 as applying to "materials reflecting deliberative or policy-making processes" (*EPA* v. *Mink*, 410 U.S. 73, 89 (1973)) and to "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' " (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), quoting *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). No court has ever held that the exemption is limited to memoranda generated in the course of an adjudicatory process. The district court thus was correct in asserting (Pet. App. 37a) that "[t]he interest of the Department of State in candid discussion in the course of formulating foreign policy is protected by the deliberative process privilege." Where, as here, the memoranda at issue are drafted for the use of State Department officials in the policy-making process and "discuss sensitive and sometimes highly emotional issues which evoke strong reactions from the parties to the Middle East dispute" (Atherton Aff., C.A. App. 127),[2] their

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals; "Atherton Aff." refers to the affidavit of Alfred L. Atherton, Jr., an Ambassador at Large with special responsibilities for Middle East negotiations, filed by the Department in support of its exemption claims.

disclosure would clearly pose a risk of injury to " 'the consultative functions of government' " (*EPA* v. *Mink*, *supra*, 410 U.S. at 87, quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)). They therefore constitute "legal advice" that, as the court of appeals correctly observed (Pet. App. 7a), "fits exactly within the deliberative process rationale for Exemption 5."

Petitioner also erroneously argues (Pet. 8-10) that the memoranda at issue are "final" decisions that constitute the "working law" of the Department and therefore cannot be advisory memoranda protected by Exemption 5. In making this argument, petitioner relies primarily on another decision of the court below, *Coastal States Gas Corp.* v. *Department of Energy*, 617 F. 2d 854 (D.C. Cir. 1980). This, of course, amounts to an assertion that the court of appeals misapplied its own precedent, a claim that this Court does not normally review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, *Coastal States* is clearly distinguishable. It concerned interpretations of Department of Energy petroleum pricing and allocation regulations provided by the Department's regional counsel in response to inquiries by agency auditors who needed to know how to apply the regulations to particular fact patterns in the course of determining whether audited firms had committed violations. *Coastal States Gas Corp.* v. *Department of Energy*, *supra*, 617 F. 2d at 858-859. The regional counsel memoranda were, moreover, indexed and referred to as precedent. *Id.* at 860. The *Coastal States* court contrasted those interpretive memoranda to lower-level staff with "advice to a superior," which it indicated is properly considered an element of the agency deliberative process protected by Exemption 5. *Id.* at 868. The court below reiterated that distinction (Pet. App. 8a), observing that the "flow of advisory material [in this case] is exactly opposite to the paradigm of 'final opinions,' which typically flow

from a superior with policy-making authority to a subordinate who carries out the policy" (footnote omitted). It noted further (Pet. App. 9a) that there is a significant distinction between "working law" of an agency and advisory memoranda consulted by officials with discretion to follow the advice or not, as its persuasive value dictates. Accordingly, the court of appeals correctly concluded that the memoranda at issue here, which petitioner concedes (Pet. 9) are analyses that the Secretary of State merely "takes cognizance of" in the course of formulating the government's foreign policy, are documents that "clearly qualify for protection under FOIA Exemption 5" (Pet. App. 9a).[3]

Finally, there is no merit to petitioner's claim (Pet. 10) that because the district court failed to make an in camera inspection of the documents or to permit the discovery sought by petitioner, the court could not properly enter summary judgment in favor of the government. Petitioner concedes that the "withheld documents" are "*interpretations* of publicly available facts" (Pet. 8; emphasis added) and that they were prepared for the Secretary of State by subordinates for use in the making of foreign policy (Pet. 9). Given (1) the agreement of the parties on these facts, (2) the detailed discussion of the memoranda in the affidavits of Ambassador Atherton and others (see Pet. App. 10a),

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[3]Petitioner also relies on *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F. 2d 242 (D.C. Cir. 1977), which he mischaracterizes (Pet. 9-10) as a case in which opinions of the Judge Advocate General and other legal memoranda that were "utilized as background by Air Force officials in contract negotiations" were "determined, for the most part, to be outside the scope of Exemption Five." In fact, the court indicated that only one of seven memoranda at issue seemed clearly outside the scope of Exemption 5 (566 F. 2d at 257-258); it remanded for additional findings on all of the memoranda and suggested that the six others would be protected by Exemption 5 if shown to be "advisory material, containing opinions and recommendations" without reasonably segregable factual portions (*id.* at 256-257; see also *id.* at 254-255 n.28).

(3) the lack of any indicia of bad faith, and (4) the settled principle that in camera review of documents in FOIA cases is discretionary (see, *e.g.*, *EPA* v. *Mink*, *supra*, 410 U.S. at 92-93; *Hayden* v. *National Security Agency/Central Security Service*, 608 F. 2d 1381, 1384-1388 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Maroscia* v. *Levi*, 569 F. 2d 1000, 1003 (7th Cir. 1977); *Bell* v. *United States*, 563 F. 2d 484, 487 (1st Cir. 1977)), the court of appeals correctly concluded that the district court did not err in granting summary judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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